The BAR ASSOCIATION BULLETIN

Entered as second-class matter, April 13, 1926, at the Postoffice at Los Angeles, California, under the Act of March 3, 1879

Volume 3, Number 6 NOVEMBER 17, 1927 5c a copy: $1 a year

Official Publication of the Los Angeles Bar Association, Los Angeles, Cal.

In This Issue

Printed by PARKER, STONE & BAIRD COMPANY
Law Printers and Engravers
241 East Fourth Street Los Angeles, California

The BAR ASSOCIATION BULLETIN

Vol. 3 NOVEMBER 17, 1927 No. 6

Published the first and third Thursdays of each month by the Los Angeles Bar Association and devoted to the interests of the Association.

Office: 535 Title Insurance Building, Los Angeles
Fifth and Spring Streets
Telephone VA ndike 7735

LOS ANGELES BAR ASSOCIATION

(City and County—Organized 1888)

Members of the Bar Association: Please note the advertisers in the BULLETIN. This is YOUR magazine, and its financial success is dependent upon the patronage of organizations having messages to convey to the legal profession.

Libel and the Newspaper

By HONORABLE LEON R. YANKWICH, *Judge of the Superior Court, Los Angeles County; Author of CALIFORNIA PLEADING AND PROCEDURE.*

I.
WHAT IS LIBEL?

Because, on the one hand, libel inflicts a grievous wrong on the individual at whom it is aimed,—by infringing the right guaranteed to him by law to be protected in the estimation in which he stands in the opinion of others,—and because, on the other hand, the safety of society and of free institutions demands that there be freedom of discussion on matters of public nature, it is proper that a discussion of the rights of newspapers to comment on public affairs and matters of public interest be preceded by an inquiry into what libel is.

Libel is written defamation.

Our Code declares libelous every false and unprivileged publication which exposes a person to hatred, contempt, ridicule or obloquy, or causes him to be shunned or avoided, or which has a tendency to injure him in his occupation. (Civil Code, sec. 45.)

Libel may occur in a writing of any kind, a picture, a cartoon, effigy or any other representation to the eye.

Whether a publication is libelous is determined by considering it in its entirety and by construing the words according to their common understanding,—and not according to the writer's secret intention.

The writer's intention is immaterial. If what he writes is *not* a libel, it is of no consequence that he may have *intended* to libel an individual.

By the same rule, if a publication is libelous, the fact that it was the result of a mistake,—that the writer never intended to libel the person of whom he is writing—is of no moment. In both instances the writer is judged by what his product *is*, and *not* by what he *intended* it to be.

Our statutory definition of libel is broad. It includes almost any language which, upon its face, has a natural tendency to injure a man's reputation, either generally or with respect to his occupation.

And this is true whether it charges a violation of law or not.

A charge of crime if unprivileged, is *always* libelous.

So is any language, short of a charge of crime, which reflects upon a person's integrity, upon his business, moral or social character, which imputes to him conduct of a fraudulent or dishonorable nature, or which exposes him to hatred, contempt, ridicule or obloquy.

Not every false charge is a libel.

The charge must be of such a nature that a court can presume, as a matter of law, that it will tend to disgrace and degrade a person, or hold him up to public hatred, contempt, or ridicule, or cause him to be shunned or avoided.

It must be one tending to lower him in the opinion of men whose standard of opinion the court can properly recognize.

While this may give a general idea of what imputations are libelous, some concrete illustrations taken from the decisions of our highest courts will serve to emphasize the general statements just made.

In a case decided some years ago, the Supreme Court of California had under consideration an article published in an Italian newspaper of San Francisco, which stated that "Mr. Tonini has not *moved away*, but has been *discharged* by the firm of G. B. Cevasco & Co. for conduct not irreprehensible."

Notwithstanding the negative and wholly inferential character of the imputation in this statement, the court ruled that the publication was libelous.

The court used the following language which gives a clear indication of the case in which words may be held to expose a person to obloquy:

> "We think that the language charged, upon its face, tended naturally, necessarily, and proximately, to produce some, at least, of the results mentioned in section 45 of the code quoted; that its natur-

**Address delivered before The Women Lawyers' Club of Los Angeles, November 10, 1927.*

al effect was to expose plaintiff to obloquy—among the definitions of which given by Webster are 'blame', 'reprehension' —and 'to injure him in his occupation'. * * * 'To expose one to obloquy is to expose him to censure and reproach, as the latter terms are synonymous with the word 'obloquy'. * * * Surely no intelligent man could read these publications without understanding them to mean that the plaintiff was not an honorable person, and has been guilty of such reprehensible misconduct as should deter people from trusting him in his occupation. It cannot be justly said that the language does not impart anything of a defamatory character concerning the plaintiff." (Tonini v. Cevasco, 114 Cal. 266.)

In a more recent case, the court had under consideration an open letter written by two citizens to a Santa Barbara newspaper protesting against the annexation of certain territory to a distant school district. The article stated that one Stevens had drawn the description of the district. It called the inclusion of the distant land "legalized robbery."

It is a rule of the law of libel that it is never libelous to accuse a person of doing a lawful act, no matter what epithets the writer applies to the act. Thus to say of a person that he is not honorable because he pleaded the statute of limitations to a just debt is not libel, for the reason that any person has a legal right to refuse to pay a debt which is outlawed.

Such an act, although lacking public approval, does not disgrace him.

This principle which our Supreme Court had applied in a prior case (Mellen v. Times-Mirror Co., 167 Cal. 587) we urged as to this article.

But the court refused to apply it, saying:

"Considering the publication herein 'as well from the expressions used, as from the whole scope and apparent object of writer' * * * it in effect charges the plaintiff with procuring by crooked methods an unjust change in the boundaries of a school district and with being actuated by bad faith in so doing." (Stevens v. Snow, 191 Cal. 58.)

To our argument that the boundaries of the school district could be changed by the supervisors only; that every citizen had the right to prepare, circulate, file and urge the adoption of such a petition; and that consequently the letter only charged Stevens with doing that which he had a right to do under the law, and was therefore not libelous, in spite of the epithets used, the answer of Chief Justice *Myers* was:

"In the application of this rule, the publication should be measured not so much by its effect when subjected to the critical analysis of a mind trained in the law and in the application of the rules of pleadings, as by the question 'What would be its natural and probable effect upon the mind of the average lay reader of the newspaper?' We have no doubt that the latter would understand therefrom that the plaintiff was accused of bad faith and crooked dealing."

You will gather from this that our courts, in adopting the impression which the average reader gathers from a publication as the criterion for determining whether it contains any disgraceful imputation, construes it strictly against the writer.

Under it, a thin thread, which is easily broken on the libel side, forms the dividing line between libelous and non-libelous publications.

Libel lurks in vague general charges and inferences.

Easy to make, they are the most difficult to prove.

II.

THE PRIVILEGE OF NEWSPAPERS

For the proper understanding of the doctrine of privileged publications as applied to newspapers, it is necessary to state briefly the nature and kind of privileged publications recognized in the law of libel.

A privileged publication is one made upon an occasion which really or apparently furnishes a legal excuse for making it.

In the words "really or apparently" lies the distinction between publications which are absolutely and those which are only qualifiedly privileged.

In the case of absolute privilege the occasion is a complete or absolute excuse.

In the case of qualified privilege, the occasion furnishes only an apparent excuse.

In both instances, the effect of the privilege is to make non-actionable, words which but for the privileged occasion, would be actionable.

Both furnish immunity for libelous statements.

This immunity is complete and unconditional in the case of absolute privilege.

It is conditional in the case of qualified privilege.

And the condition upon which it depends to make it at all available is the absence of express malice.

Our Code declares publications made upon the following occasions to be absolutely privileged:

(1) In the proper discharge of an official duty;

(2) In any legislative or judicial proceeding, or in any other proceeding authorized by law (Civil Code, sec. 47, subds. 1 and 2).

Publications made in discharge of public duty include all official acts, reports, recrecords and complaints required by law to be made by persons in discharge of their official duties.

The absolute privilege attaching to legislative proceedings affords complete immunity to statements made in legislative bodies by members thereof, while such bodies are in session, to statements contained in petitions, memorials or reports addressed to such legislative bodies or committees thereof, and to statements of witnesses before such bodies.

Malicious falsity does not destroy this immunity.

The absolute privilege attaching to judicial proceedings affords complete immunity for libelous statements contained in pleadings, or in declarations of judges, counsel, litigants and witnesses.

By its very nature, this form of privilege does not concern newspaper publishers as such.

Until recently the qualified privilege of newspapers attached only to:

(1) A fair and true report without malice, of a judicial, legislative or other public official proceeding, or of anything said in the course thereof, or of a verified charge or complaint made by any person to a public official upon which a complaint or warrant shall have been issued; and

(2) A fair and true report, without malice, of the proceedings of a public meeting if such meeting was lawfully convened for a lawful purpose and open to the public, or the publication thereof was for public benefit. (Civil Code, sec. 47, subds. 4 and 5.)

The principles by which is determined the fairness of reports of judicial, legislative and other public official proceedings and of public meetings are generally the same.

Fairness is absent when the report contains fragmentary, incomplete parts of the proceeding which do not indicate a fair summary of the whole thereof.

The addition of facts which did not occur, or comments or inferences drawing libelous conclusions from the facts, such as (in the case of the publication of the fact that a person has been arrested and upon what charge) comments implying guilt, destroy the privilege.

Any such comment is considered an "excessive publication."

It nullifies the privilege, as does also express malice.

While our Code has long recognized as qualifiedly privileged, communications made in discharge of duty, (Civil Code, sec. 47, subd. 3) our courts repeatedly refused to recognize that a newspaper in commenting on the acts and conduct of public officials was performing a duty, legal, civic, or other.

The answer to the claim of newpaper privilege was always, in effect, "A lie is never privileged."

"One can justify," said our Supreme Court, "the publication of a libel against a candidate for office upon privilege, only by proof that the accusation is true."

"One cannot," echoed one of our Appellate Courts, "escape responsibility for a falsehood under the claim of privilege."

The challenge to this principle was this:

A lie is privileged if told on a privileged occasion, without malice.

If this were not so, and if truth were the only defense to civil libel, the doctrine of privileged communications might as well be abandoned.

One does not need the protection of privilege to tell the truth.

To use a homely illustration:

One needs an umbrella when and where it rains.

When it is not raining or when one is under shelter one does not need an umbrella.

The protection of privilege is needed when the libeller has not truth on his side.

In the *Snively case,* the Supreme Court repudiated its prior doctrine and extended to newspaper comments on the acts and conduct of public officials, the privilege which attaches to communications made in discharge of duty. (Snively v. Record, 185 Cal. 143.)

Such comments, even though false, even though amounting to a charge of crime or corruption, are privileged, if published without express malice (with belief in their truth).

Under it, a publisher may defend an accusation against a public official by showing *not* that it is true, but that he *believed* it to be true, and published it in good faith, so believing.

And if the jury believe him, his defense is complete and the plaintiff cannot recover.

This qualified privilege depends upon the absence of malice in fact.

Malice in fact (or express malice) destroys qualified privilege, of whatever character such privilege be.

In each case (communications in discharge of duty, reports of judicial, legislative or other public proceedings or reports of public meetings) the privilege is dependent upon the want of malice in fact.

Such malice in fact is not inferred from the communication or publication.

Nor is it ever presumed.

And by express malice is meant actual malice—in other words, the motive of personal spite or ill-will towards the plaintiff, the malice of malevolence in the sense in which that word is used in the well-known phrase from the litany of the Church of England, "from envy, hatred and malice, and all uncharitableness."

Mark Twain uses the word in this sense in his *Autobiography*, wherein when speaking of man he says:

"Of the entire brood, he is the only one—the solitary one—that possess *malice.*"

But even though the communication be privileged, even though the writer or publisher assert that he believed the charge to be true, the jury may infer malice from the character and tone of the publication and the circumstances connected with it.

Such malice may also be inferred from other facts and circumstances outside of the publication, such as the acts and conduct of the writer or publisher.

It may also be proved by other publications of the same or of a different character directed at the person libelled.

It can be seen readily that our Supreme Court while liberalizing the rule of newspaper privilege has not given newspapers "a shield of Zeus."

Along with the qualified privilege we are discussing, newspapers have the right of fair comment.

While these terms are often used interchangeably, they differ in this:

In qualified privilege, the article would be libelous but for the privilege.

Fair comment is no libel.

In order that comment be fair:

(1) It must be based on facts truly stated;

(2) It must not contain imputations of corrupt or dishonorable motives on the person whose conduct or work is criticized, save in so far as such imputations are warranted by the facts;

(3) It must be the honest expression of the writer's real opinion.

Fair comment is essentially opinion based on facts.

It protects the comments of a writer on plays, works of literature or art, schemes of improvement, governmental measures and the like.

III.

THE PRIVILEGE OF REPORTS OF JUDICIAL PROCEEDINGS

The question has often arisen, although it has never been decided in California, whether pleadings, or complaints, filed in the office of the county clerk and which have not yet been read in open court or been the subject of some judicial act, are qualifiedly privileged.

Generally, courts have made a distinction between a complaint and a judicial proceeding. (Nixon v. Dispatch Printing Co., 101 Minn. 309, 12 L. R. A. (N. S.) 188.)

The older cases even went so far as to hold that the qualified privilege of publication applied only to proceedings on the merits (hearing in open court).

But this rule has been modified and the privilege now attaches to reports of ex parte and preliminary proceedings.

This rule will render privileged a fair report of the charges made in a bill of equity which has been presented to the court, and upon which the court has acted by making an order that the defendants appear and show cause why an injunction should not be issued against them. (Lundin v. Post Publishing Co., 217 Mass, 231, 52 L.R.A. (N.S.) 207; Metcalf v. Times Publishing Co., 20 R.I. 113, 78 Am. St. Rep. 113.)

So that, taking the action to which publicity is mostly given, that of divorce, the

issuance of an order to show cause re alimony, makes the publication of the contents of the complaint qualifiedly privileged.

However, I have gone further and taken the view that in California the privilege of publication attaches the moment the pleading is filed in the office of the clerk.

My reasons are these:

The filing of a complaint is a part of a judicial proceeding (the first step therein) (Code of Civil Procedure, sec. 405), or of a "public official proceeding" (Civil Code, sec. 47, subd. 4) and the subsequent pleadings—successive steps therein.

Pleadings, when filed, become public writings. (Code of Civil Procedure, sec. 1888.)

Section 1872 of the Code of Civil Procedure declares:

"Every citizen has a right to inspect and take a copy of any public writing of this state * * * *."

By section 1032 of the Political Code, "the public records and other matters in the office of any officer are at all times, during office hours, open to the inspection of any citizen of the state." This right may be enforced by writ of mandate. (Coldwell v. Board of Public Works, 187 Cal. 510.)

The right of a citizen to inspect and take a copy of a public writing, the right, in other words, of familiarizing himself with the contents thereof, implies the right to make the contents known to others.

When made public, they loose their private, confidential character.

"What one may lawfully speak he may lawfully write and publish." (In re Shortridge, 90 Cal. 526, 533.)

Upon the foregoing reasoning, I expressed the opinion in an article published in the issue of June 17, 1926, of the BULLETIN of the Los Angeles Bar Association that in the absence of malice, publication by a newspaper of the contents, or a fair summary of a complaint, or any other pleading, after it is filed, would not subject it to an action for libel.

Since that opinion was expressed, both the Appellate Division and the Court of Appeals of New York have, under statutes similar to ours, so held. (Campbell v. New York Evening Post, 157 N.E. 153; Same v. Same, 218 N.Y.S. 446.)

A New York woman brought suit against a newspaper for the publication of a news item which referred to the fact that a summons had been served against her and reciting the alleged facts in the case. Before the complaint was filed the proposed suit was settled out of court. The woman sued for libel, contending that the publication was untrue, that it was false to say that she had been sued when only summoned and that the publication of news concerning the issuance of a summons was not privileged.

The Court of Appeal said that *"A lawsuit, from beginning to end, is in the nature of a judicial proceeding."*

I quote from the opinion:

"* * * with us the act of one party institutes the action. The service of the summons begins the suit. A newspaper may publish of A. that B. has begun an action against him by the service of a summons. No reticence is demanded on that score. It may go further and state that the complaint has been filed in the county clerk's office. To stop there and hold that the newspaper states the contents of the complaint at its peril is to revive a rule of privacy in relation to litigation that no longer has substance. To say that privilege protects the publication of the complaint when the summons is served by order of the court on a nonresident and does not protect the publication when the defendant is a resident is to state a distinction that has no basis in common sense. We are not bound to keep up such frivolous legal fictions. Judicial proceedings in New York include in common parlance all the proceedings in the action. We may as well disregard the overwhelming weight of authority elsewhere, and start with a rule of our own, consistent with practical experience.

"Questions of public policy should be considered. In this case it appears that the action against plaintiff was discontinued; that Mrs. Nichols thus got her alleged false and scurrilous charges before the public as news and then dropped her case. It is contended that such acts should not be deemed privileged, so as to protect the publisher. The contention is too far-reaching. Scandalous matter may come before the public in connection with lawsuits. Personal malice may thus be given a hearing. A complaint withdrawn may not be the vindication that a decision

favorable to the accused would be. But complaints are withdrawn after applications have been made to the courts and suits have been dropped before verdicts. Consistency requires us to go forward or to go back. We cannot go back and exclude the publication of daily reports of trials before a final decision is reached. The present distinction is indefensible. Therefore we proceed to a logical conclusion, and uphold the claim of privilege on the ground that the filing of a pleading is a public official act in the course of judicial proceedings."

Because the New York statutes make any paper filed in the county clerk's office, excepting pleadings in actions for divorce, public property, subject to inspection and examination at all times (as does our law), and because the New York Practice Act defines (in section 4) an action in almost the identical language of our Code (Code of Civil Procedure, sec. 22), the ruling of the two highest courts of New York should be determinative of the question for us in California.

An additional reason exists with us. In New York an action is begun by the service of the summons, with or without a complaint. With us, an action is commenced by the filing of a complaint, in all cases except in condemnation proceedings. (Code of Civil Procedure, secs. 405 and 1243.)

IV.

FOR GREATER FREEDOM OF EXPRESSION

History discloses the fact that every attempt to extend the right of free discussion among English-speaking people has been denounced as subversive of the public weal —and dire disaster predicted to follow it.

Every right newspapers enjoy — their very right to exist,—is the fruit of strife and struggle.

At all times, in all ages, there have been individuals and groups protesting against the "tyranny of the press" and calling for repression and curtailment of the freedom of discussion.

And because such call is heard today in many quarters, I consider it a hopeful sign and an omen of safety that the Supreme Court of Illinois, a court noted for its conservatism, recognized in recent years the absolute right of newspapers to criticize and attack governmental agencies, without liability for civil or criminal libel. (Chicago v. Tribune, 307 Ill. 595.)

When the City of Chicago endeavored to make the law of civil libel an instrument for the repression of the freedom of the press, by suing a Chicago newspaper for damages to the municipality alleged to have been caused by libelous publications directed at its government, the Supreme Court of Illinois upheld the right of free men to attack (without fear of prosecution for civil or criminal libel) governmental agencies in the following ringing words:

> 'The fundamental right of freedom of speech is involved in this litigation, and not merely the right of liberty of the press. If this action can be maintained against a newspaper, it can be maintained against every private citizen who ventures to criticise the ministers who are temporarily conducting the affairs of his government. Where any person by speech or writing seeks to persuade others to violate existing law or to overthrow by force or other unlawful means the existing government, he may be punished, * * * but all other utterances or publications against the government must be considered absolutely privileged. * * *."

The court added:

"This action is out of tune with the spirit and has no place in American jurisprudence."

The liberal rule of privilege in force in this state is being followed elsewhere. The following news item indicates that the State of Oregon which for many years under an old decision (Upton v. Hume) refused to recognize the right of a newspaper publisher, as a citizen, to comment freely on acts of public officials, has gone so far as to adopt the English doctrine which extends this doctrine to public men, though not in public office or candidates for such office:

"By Associated Press.

"Salem, Oregon, Sept. 16. A. E. Beck, Marshfield attorney, charged The Coos Bay Times of Marshfield with publishing two alleged libelous editorials in which Peck was branded dictator of politics in Coos county and said to have been affiliated with the Ku Klux Klan.

"The Marshfield attorney declared the alleged libelous articles brought him into 'public hatred, contempt and ridicule'.

" 'When a man enters the political arena, even though not a candidate,' the supreme court opinion said, 'he must not be too sensitive about criticism. There are generally blows to receive as well as to give . . . .'

" 'The Coos Bay Times, as a newspaper, had the right to make fair comment and criticism upon the plaintiff's alleged unreliability in political matters affecting public interest, and it also was within its province to criticise his advocacy of doctrines which it deemed to be fallacious and inimical to the public welfare'."

These are hopeful signs. They evidence the fact that the spirit of the fathers is abroad in the land.

They, as Mr. Justice Brandeis wrote in his dissent in Anita Whitney case, "believed that the final end of the state was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary.

"They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty.

"They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly, discussion would be futile; that with them discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. * *

"They recognized the risk to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies. * * * *

"Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form."

There is security for us in keeping alive this concept of the "liberty to know, to utter, and to argue freely according to conscience, above all liberties." (Milton.)

Amendments to Code of Civil Procedure Affecting Proceedings in Probate Court

By HENRY G. BODKIN *of the Los Angeles Bar, Professor of Wills and Probate Law, Loyola College.*

The following is a brief resume of the amendments passed at the last session of the legislature affecting proceedings in the Probate Court:

Section 1308-A—Is a new section providing that when a will is admitted to probate it must be recorded in the minutes by the clerk with the notation "Admitted to Probate," giving date of admission.

Section 1349—Has been amended to provide that when the executor named in a will is a corporation or national banking association that has sold its business or has consolidated with another corporation or national bank authorized to act as executor, that the court may issue letters testamentary to the successor corporation or association. This amendment undoubtedly was brought about by the numerous consolidations and mergings of banks and trust companies and has the effect of avoiding any confusion as to the right of the successor or corporation to act as executor.

Section 1373—Is amended to provide that notice of the hearing of the petition of letters of administration shall be posted at the county courthouse instead of three public places in the county. The law providing for the posting of notices in three of the most public places involving probate proceedings has been amended to provide that such notices shall be posted at the courthouse instead. The sections involving such changes will be discussed at the end of this article.

Section 1381—Is a new section and authorizes the United States Government or a department or bureau thereof making or awarding allowances to estates of decedents, minors or incompetents, to commence and prosecute actions on executors, administrators or guardians bonds; it provides that the government, or department thereof shall have the same right to petition the court for appointment or removal of guardians of minors or incompetent persons; and also shall have the same right to object to the accounts of executors, etc., as has an heir at law. Until the enactment of the present statute there was no provision under our law for the government to appear as an interested party in such probate proceedings.

Section 1454-A—Is a new section authorizing the surviving husband or wife, guardian of the estate of any insane or incompetent husband or wife of any deceased person, or if no husband or wife is living, then the children or the guardian of the children, whether minors or incompetents, to collect moneys from any building and loan association without securing letters of administration, with the same force and effect as they were permitted to do under Section 1454 regarding bank accounts.

Section 1465 — This section has been amended to provide that if there be no surviving husband or wife, then during the course of administration an order may be made setting aside property for the use of the minor children out of the real estate owned in common by decedent and the person or persons to whom the homestead is set apart, or if there be no common property and no jointly owned property, then out of the real estate belonging to the decedent as a separate property.

Section 1469 — This section has been amended to provide that in proceedings to set aside an estate not exceeding $2,500 to the surviving wife or children, notice of the proceedings shall be given by the clerk of the court rather than by order of court.

Section 1523—This section, dealing with the confirmation of sales of personal property by the court, has been amended to provide that in the case of stocks or bonds it is not necessary to have a confirmation thereof, in the event that the court has, upon the petition previously presented, made its order authorizing the sale or transfer thereof and fixed the conditions upon which the same is to be made. This amendment should simplify the procedure on sales of stocks and bonds and was much needed.

Section 1526 — This section has been amended to provide for the sale of personal property on credit. It also provides in the case of perishable property that notice of

the time and place of sale shall be sufficient if given for one day by posting in three public places in the county. In the event the sale is upon credit, at least twenty-five per cent shall be in cash and the balance to be represented by note secured by a pledge or chattel mortgage of personal property. Said note and security shall be approved by the court at the time of the confirmation.

Section 1559 — This section has been amended to authorize the administrator or executor to enter into a written contract to sell personal property, providing for the payment of commissions to an agent on such sale when confirmed by the court. It further provides that if the sale is made on an increased bid at the time of the confirmation to a purchaser not secured by the agent holding the contract, that one-half of the commissions shall go to such agent and the balance of the commissions to the other agent, if any, securing the other purchaser. This legislation was also needed.

Section 1578—This section which formerly provided the procedure for the placing of mortgages on estate property has been amended to provide a procedure for placing trust deeds theron. It formerly provided that on an application for a mortgage that the court should issue an order to show cause to be heard in not less than four weeks nor more than ten weeks, personal service to be made at least ten days before the hearing or by publication for four weeks in a newspaper of general circulation. The amendment provides for a brief notice containing the name of the estate, description of the land, refers to the petition for particulars and notifies the persons interested to appear at time and place fixed to show cause why the property should not be encumbered. This notice shall be given by posting ten days before hearing at the courthouse or by publication in a daily newspaper at least ten days, including the first and last publication, and if publication in a weekly paper, the notice must be published twice. There appears to be no direct authority for placing a trust deed on estate property as Section 1577 was not amended.

Section 1579 — This section provides the procedure for leasing estate property by executor, etc. It also formerly provided for an order to show cause by the court, notice thereof by personal service at least

ten days prior to hearing or by publication for two weeks. It has been amended so that the clerk gives notice as under section 1578.

Section 1580 — This section covers the sale of mining property. The amendment does away with the order to show cause and provides for notice to be given by the clerk as in sections 1578 and 1579.

Section 1598 — This section has been amended to provide that upon the filing of a verified petition by the executor or administrator or other person interested requesting an order authorizing or directing the executor, et cetera, to make the conveyance or transfer pursuant to a contract made by decedent, that the clerk shall fix the time and place of the hearing, instead of the order to show cause formerly provided to be issued by the court, which notice shall be published as formerly provided in the statute and shall be posted at the courthouse instead of three places as formerly provided.

Section 1599 — This section has been amended to provide that at the time and place fixed for the hearing of the proceedings provided in section 1598 and after proof by affidavit or otherwise that notice provided under section 1598 has been duly and regularly given, the court shall proceed to hear the petition. The section, prior to amendment, provided that proof should be made of the due publication of the order to show cause, which order to show cause has been replaced by the clerk's notice.

Section 1631 — This section has been amended to provide that on the final account of the exeecutor or administrator he shall file vouchers supporting his account which shall remain on file during appeal and in any event for not less than five years after entry of final decree of distribution. After five years the clerk may destroy the vouchers or return them to the executor, et cetera, or attorney of record for executor, et cetera, but not pending the appeal. It also provides for the withdrawal of original vouchers upon filing certified copies.

Section 1663 — This section governing partial distribution of estates of deceased persons has been amended to provide for the payment or partial distribution of a specific bequest of a superior class without a pro-rata distribution or payment among all legatees of all classes. It also provides for partial distribution of the estate of a nonresident decedent, whose estate is being probated in another jurisdiction and in this state. Such part of the estate as is probated in this state is distributed to the executor or administrator in the other jurisdiction upon the order of our probate court before the final closing of the estate. This distribution shall be based upon an order made upon a petition filed showing such distribution is necessary or that it is for the best interest of the estate.

Section 1691 — This section has been amended to provide that in the event that any estate is assigned or distributed to a non-resident minor, insane or incompetent person who has a guardian of his estate duly appointed under the laws of any foreign jurisdiction, the distribution of such assignee's or distributee's share may be made to such legally appointed guardian whose receipt therefor, together with certificate under section 1798, when filed with the clerk of the court, shall be sufficient as a voucher in favor of said executor, et cetera.

Section 1723 — This section has been amended to provide that in proceeding to establish the fact of death, notice shall be given as formerly with the exception that such notice shall be posted at the courthouse instead of three public places. It also provides that the court may in its discretion order such further notice as it deems proper.

Section 1761 — This section provides for the serving and filing of a request for special notice. It has been amended to provide that any attorney for the United States government, or any department or bureau thereof, which makes allowances in the form of compensation insurance for the benefit of the estate of any minor, insane or incompetent person, shall have the right to file such requests for special notice. It provides for the filing of a request for notice of the filing of petitions for allowances of any nature payable from the ward's estate as well as the filing of petitions for investments of funds for the estate. It also provides that in addition to the notice, that the person filing such request shall be furnished a copy of such petitions, applications, accounts or proceedings within the time provided by the statute prior to amendment.

Section 1788 — This section which provided for the giving of an additional bond by guardian upon the sale or mortgaging

of real estate has been amended to provide for the giving of such additional bond upon the executing of a deed of trust upon the real property pursuant to order of court.

Section 1810b — This section governing contracts for attorneys' fees made by or for the benefit of minors has been amended to provide that all contracts made for such attorneys' fees shall be void unless the contract is approved by the court having jurisdiction of the pending litigation on behalf of said minor. The petition to have said contract approved by the court may be filed at any time after the appointment of the guardian ad litem in said litigation. In the event the contract for attorneys' fees for or on behalf of the minor has not been approved by the court, then such fees shall be fixed by the court in which said judgment is rendered.

AMENDMENTS TO CODE PROVIDING FOR POSTING NOTICES AT THE COURTHOUSE INSTEAD OF THREE PUBLIC PLACES IN THE COUNTY

Section 1552 providing for notice of hearing of the proceedings for the sale of real estate, section 1592 on proceedings for securing an order for the investment of funds of the estate pending settlement, section 1633 providing for posting of notices of settlement of final account of executor, et cetera, section 1668 providing for notice on proceedings to determine heirship; section 1699 providing for notice of hearing and the filing and settlement of trustees account; and section 1724 upon proceedings for the establishment of identity of heirs, have all been amended to provide that notices of such proceedings shall be given by posting a notice thereof at the courthouse instead of by posting in three of the public places in the county. In the past the provisions of the Code have been complied with by the calendar clerk of the probate departments posting three notices at the three entrances of the courthouse. It was a duplication of effort, unnecessarily added a great deal to the work of the clerk, and did not give any more notice than is provided by the posting of the notice by the clerk of such proceedings at a place in the courthouse fixed and determined upon for such purposes.

The foregoing amendments should have the effect of simplifying the procedure and will result in a benefit to the estates probated in that it will enable the executor and administrator to handle the estates in conformity with present day business methods, particularly if the courts construe section 1578 as granting authority to place a trust deed on estate property.

I trust that this will be of some benefit to the members of the bar.

The President's Page

Fellow Members,

Los Angeles Bar Association:

THANKSGIVING

Thanksgiving day represents a quaint but wholesome American custom. It is a time of thoughful appraisal and of gratitude. Both are constructive and uplifting sentiments. With a feeling of thankfulness let us acknowledge that we, as an Association, have considerable to be grateful for.

First and above all is that spirit of cooperation, that anxiety to serve, which characterizes the membership of Los Angeles Bar Association. No officer or set of officers alone can accomplish anything worth while. They can only aid in expressing in concrete form those ideals which are already lodged in the hearts and minds of the members of the Association.

Our report of "What the Los Angeles Bar Association Is Doing," printed in the October 6th issue of the BULLETIN, has elicited encouraging comment from various parts of the country. Among the numerous commendatory letters received was a communication from Mr. Charles A. Boston, Chairman of the Committee of Professional Ethics of the New York County Lawyers Association, and member of the Executive Committee of the American Bar Association. I have also a request from "The Brief," the official organ of a national legal fraternity, Phi Delta Phi, to reprint this report. The editor says:

> "But there is a further reason for publishing this article: Every now and then the young men, in convention assembled, suggest that the Fraternity seek to take over the work bar associations are doing, or failing to do. I believe it has been the opinion of the officers all along that a young lawyer had better get into harness in his local and state associations, instead of attempting to set up new machinery for like purposes. Your showing of what a live bar association is already doing is therefore pertinent to a recurring problem."

Mr. Eugene Daney, of San Diego, formerly President of the California Bar Association, and recently elected member of the Board of Governors of the State Bar, in an address before the San Diego Bar Association read from the report referred to concerning the future relation of the local bar associations with the State Bar, citing the numerous activities of Los Angeles Bar Association as examples of what each local association can do and as evidences of the necessity of the continued and increased activities of the local groups.

I know that you will all be grateful to learn that your labors have been recognized and commended by Bar Association leaders throughout the state and elsewhere.

I cannot refrain in this connection from including the names of two greatly beloved leaders in this idealistic movement—Hon. James Grafton Rogers, President of the Colorado Bar Association, and member of the Executive Committee of the American Bar Association, and our own Mr. Hugh Henry Brown, of San Francisco, who delivered before our Association some months ago one of the most eloquent and at the same time one of the most practical addresses concerning bar association activities to which we have had the pleasure and inspiration of listening.

If space permitted I would be glad to include these and other letters, but the point I am making is the wholly impersonal one of an expression of encouragement to our twenty-five hundred members constituting an organization recognized throughout the country as the most active bar association in the United States.

And so, in referring to these various accomplishments for which we may be truly thankful, I am not endeavoring to point attention to any individual—although some have served and sacrificed more than others—but I pay tribute to that idealism which, thank God, is now permanently enshrined in the bar of America. True, there have been critics, but there can be no movement without some friction, no friction without some heat—it is the inexorable law of progress as well as of physics. Many criticisms have been constructive and helpful; the others have been insignificant and have served by contrast to outline much more clearly the true idealism of the bar.

KEMPER CAMPBELL.

Controller's Suits

By VERE RADIR NORTON *of the Los Angeles Bar*

Inheritance Taxation seems no more inextricably interwoven with the question of settlement of estates than with the clearing of title to real and personal property. In California the State Inheritance Tax has been considered a tax upon the right of succession and the full title to property passing from a decedent does not vest until the payment of the tax. This is brought forcibly to the attention of the beneficiary of such property when he endeavors to purchase a guarantee of title thereto from a title insurance company. The stern necessity of presenting an inheritance tax release sets him scurrying to obtain one. Time is often an important incident.

This slight treatise is not concerned with the well-known and obvious methods of handling the transfer of title from a decedent to living beneficiaries by proceedings in the probate court. It has to do with a bit of procedure not, it would appear, sufficiently taken advantage of by the average lawyer.

The procedure referred to is that provided by the California Inheritance Tax Act for the recovery of inheritance taxes on property transferred to beneficiaries previous to the death of a decedent where a tax is suspected to be due, or for the clearing of title by beneficiaries from a possible lien from such taxes.

The statute provides the procedure which may be followed and used much more extensively than it is at present. The Controller of the State of California is authorized to bring a suit in the Superior Court, commenced by a petition to said court naming as respondents the beneficiaries under transfers made previous to the death of a decedent which come under the definition of taxable transfers, to-wit:

"All transfers made by a decedent without valuable and adequate consideration, in contemplation of the death of a decedent, or intended to take effect in possession and enjoyment as to the beneficiary named in the instrument of transfer, after the death of the decedent, and property passing to a surviving joint tenant by reason of the death of one joint tenant." (Abridged quotation from Section 2, Subdivisions 3, 3a, 3b, and 5, Inheritance Tax Act, Chapter 821, Statutes of 1921.)

A citation thereupon issues out of the Superior Court to these beneficiaries named, requiring them to appear at a stated time before an Inheritance Tax Appraiser as referee. These proceedings are generally referred to as "Controller's suits" or, more often as "Riley Suits," from the name of the Controller. The respondents may appear with or without counsel at the time indicated for hearing, and the State is represented by counsel and testimnoy taken before the referee in the manner of ordinary referred matters. No answer is required by the respondents and their full rights upon appeal are secured to them. If, at the hearing, the facts brought out appear to render the transfer involved a taxable one, the referee appraises the property and presents a written report to the Superior Court stating the facts of the case, the *death* of the transferror, the description and value of the property, the persons to whom transferred, the value of their interest in such property, and the tax thereon. Copies of this report are delivered to the attorneys for the State and the respondents, and the original is filed in the Superior Court. An order predicated upon this report is also filed at the same time by the referee and, ten days after filing, this order is signed by the Court unless objections to the report are filed by the interested parties. If objections are filed, a hearing de novo may be had in the Superior Court upon all matters alleged in the original petition filed.

It is observed that the order when signed by the Court has all the formal force and effect of any other decree of the Court and upon payment of the tax to the County Treasurer and a release given therefor, any lien for inheritance tax against the property involved in the proceedings is immediately dissolved.

Conversely, any persons, beneficiaries under transfers from a decedent where the possibility of payment of inheritance tax may appear, may bring an action of the same sort under the following provisions of the Inheritance Tax Act:

"Verified petitions may be filed by any

interested party with the Superior Court, alleging and admitting that a transfer within the meaning of this act has been made and the taxability thereof and the liability for such tax and the amount thereof have not been determined, and that no proceedings are pending in any court in this State wherein the taxability of such transfers and the liability therefor and the amount thereof, may be determined, and that the petitioner desires such determination and desires to pay such tax, if any be due. Upon the filing of such petition the superior court or a judge thereof shall by order designate and appoint an inheritance tax appraiser to ascertain and report to said court the amount of the inheritance tax, if any, due by said petitioner on account of such transfer, and shall fix a time and place, not less than ten days thereafter, for the hearing of said matter before said inheritance tax appraiser, a copy of which petition and order shall be forthwith mailed to the state controller, and shall refer said petition and said matter to said inheritance tax appraiser who shall have all the powers of a referee of said Court, including the powers as prescribed in Subdivision 1 of Section 16 of this act. The procedure subsequent to said reference to said appraiser shall conform to the provisions of subdivisions (1) and (2) of Section Sixteen of this act. (Section 17, Subd. 2 Inheritance Tax Act of 1921.)

"Actions may be brought against the state by any interested person for the purpose of quieting title to any property against the lien or claim of lien of any tax or taxes under this act, or for the purpose of having it determined that any property is not subject to any lien for taxes nor chargeable with any tax under this act. . . . . .
(Section 17, Subd. 3, Inheritance Tax Act of 1921.)

"The orders, decrees and judgments fixing tax or determining that no tax is due, shall have the force and effect of judgments in civil actions. . . . . ."
(Section 18, Inheritance Tax Act 1921.)

A tremendous amount of time might be saved if this procedure were more generally in use in clearing the title to property held in joint tenancy. The report of the referee and order of the court find the death of the decedent and the identity of the property held in joint tenancy just as surely as in proceedings under Civil Code, sec. 1723, and fix the inheritance tax, if any, at the same time, and if none is due, establish that fact. This procedure may not, however, be used in cases where the title to the property is registered under the Torrens Land Title Law.

In innumerable cases of personal property passing in California under administration proceedings in another state, the property may be speedily transferred and released from inheritance tax lien by the procedure indicated herein, without the necessity of ancillary proceedings in our state courts.

At the present time but few attorneys avail themselves of the opportunities offered by this procedure for speedy clearing of title to property and release from inheritance tax liens. The cases which are initiated by the State Controller are not aimed at the clearance of title, but the recovery of taxes which might otherwise be witheld. If attorneys would voluntarily bring actions under the above indicated provisions of the inheritance tax act they would be in the highly virtuous position of doing their state a service and speeding up the settlement of property titles for their clients. In the present state of congestion in our courts this should offer alluring possibilities to the members of the bar. By entering into proper stipulations with the attorneys for the inheritance tax department, the various notices of hearings and filing may be waived and the time for final disposal of the matter at issue hastened to a degree not possible in an ordinary superior court action with the same end in view. In cases where no tax could possibly be due, the proceeding is not welcomed by the inheritance tax department, of course, as it burdens the office force unduly with matters not profitable to the state treasury and becomes an imposition. However, whether or not a tax is probably due is easily ascertained by the attorney consulted, as he has the tax rates and exemptions at hand for immediate reference.

Where an important and highly desirable sale is being held up (perhaps to the great and unexpected disadvantage of the interested parties), it would appear that lawyers are in the position to do their clients a great service by observing that the lien of the state for taxes could, by taking advantage of these suggestions, be eliminated—depending upon the circumstances—in a very few days.

Doings of the Committees

BULLETIN COMMITTEE

A meeting of the *BULLETIN* Committee was held Thursday noon, November 17th, at the Alexandria Hotel, with Chairman Ellis, Messrs. Beardsley, Goodspeed, Rains, Saeta and Jones of the Committee, and Mr. Purdue, Associate Editor of the BULLETIN, present.

A discussion was had as to the articles appearing in the BULLETIN, and arrangements were made to secure articles discussing the new amendments to the Civil Code on the subject of Corporations, and the new amendments to the General Laws. Mr. Saeta was selected to prepare an index of the BULLETIN for the first two volumes, such index to be published later.

It was the consensus of opinion that articles should be published giving the full details of the organization meeting in San Francisco of the State Bar. Also, that as soon as possible the BULLETIN should print descriptive articles of the various activities of the State Bar, unless said matters were covered in the Journal of the State Bar. The Committee also felt that the BULLETIN should not serve the same purpose as the various law reviews, and that therefore the articles appearing should be restricted in length and discuss some special problem of law rather than discussing a complete field of law.

Respectfully submitted,

PAUL W. JONES, Secretary.

OPINIONS BY COMMITTEE ON LEGAL ETHICS

W. JOSEPH FORD, *Chairman*

GURNEY E. NEWLIN THEODORE T. HULL

JOHN O'MELVENY JOHN BIBY

40. DUTY TO CLIENT

Inquiry has been made as to what extent can an attorney countenance or connive at collusion in divorce proceedings.

It is assumed that collusion referred to in the inquiry is collusion as defined in section 114 of the Civil Code. Section 111 of the same code provides that divorces must be denied upon showing collusion.

Any attorney who to any extent countenances or connives at collusion in divorce proceedings commits a fraud on the Court.

Dated: October 6, 1927.

41. ADVERTISEMENT—LETTERS SOLICITING EMPLOYMENT.

May an attorney who is counsel for an association send out letters to a number of its members soliciting employment upon an annual retainer?

Such practice is a clear violation of Canon No. 27 of the Canons of Ethics of the American Bar Association, which forbids solicitation of business by circulars or advertisements, or by personal connections or interviews not warranted by personal relations. The fact that the writer of the letters is attorney for an association composed of the persons to whom the letters are addressed, does not create a personal relation such as to warrant sending the letters.

While it is true the public needs should be met by an edequate number of adequately equipped lawyers, it is a public detriment to permit or encourage lawyers to enter a race, and thus by stimulation promote the employment of lawyers. The Canon of Ethics above mentioned declares solicitation of professional employment where not warranted by personal relations to be unprofessional, whether done directly or indirectly. In our view this Canon is most commendable. The discouragement of such solicitation is a wise tradition in the profession, and tends to prevent lawyers from becoming a menace to the established peace of the community. Lawyers should answer a demand, not create one. They should be in a position to scrutinize, correct and soundly advise. In a race for business, judgment is too likely to overruled by anxiety. It is against the public interest that lawyers should become clamorous and systematic seekers by solicitation for professional employment from those not qualified to judge of their merits. (American Bar Association Anno. Can. of Ethics, 1926, page 95.)

Dated October 6, 1927.

The Political Philosophy of Mr. Chief Justice Taft*

By REUEL L. OLSON *of the Los Angeles Bar*
Author of THE COLORADO RIVER COMPACT

II

DUE PROCESS AND FREEDOM OF CONTRACT

The cases which will be discussed under the general heading of Due Process and Freedom of Contract may be divided into four groups with the following designations: The Force of Statutes, Due Process of Law, Freedom of Contract and the Police Power, and Methods of Dealing with Picketing.

According to Mr. Chief Justice Taft's words in Sioux City Bridge Company v. Dakota County, Nebraska,[1] there are certain circumstances under which courts are not bound by the provisions of statutes. Even though it "is a departure from the requirement of statute"[2] to allow a taxpayer whose property alone is taxed at 100 percent of its true value to have his assessment reduced to the percentage of that value at which others are taxed, such course of action will be allowed. Certainly this position deserves examination to see what may be its foundation in political theory.

The Sioux City Bridge Company complained that its property was overvalued for purposes of taxation, and that other real property and improvements in Dakota County were undervalued. The Nebraska statute[3] governing the case provided that property should be valued at its actual value and should be assessed at twenty percent of such actual value. Actual value was defined as meaning the value of the property in the market in the ordinary course of trade. When the Supreme Court of Nebraska passed upon the case it was held that inasmuch as the amount of tax paid by the Bridge Company had been determined in accordance with the provisions of statute, the Bridge Company had no legal ground for objection. The Nebraska court restated and applied the rule that "when property is assessed at its true value, and other property in the district is assessed below its true value, the proper remedy is to have the property assessed below its true value raised, rather than to have property assessed at its true value reduced. Lincoln Tel. & Tel. Co. v. Johnson County, 102 Neb. 254."[4] This was to say, in effect, that the situation would not be remedied by extending an incorrect method of taxation to this particular case even though such incorrect method was being

1. 260 U. S. 441, Jan. 2, 1923.
2. Idem, p. 446.
3. Nebraska Revised Statutes, 1913, sec. 6300.
4. 260 U. S. 441, 444.

*EDITOR'S NOTE: This is the third of a series of articles by Dr. Olson on this subject. The outline of the discusion covered in the series is as follows:

I. Sovereignty and Jurisdiction
  A. Sovereignty
    1. Claims of the nation in handling interstate commerce.
    2. Jurisdiction over foreign corporations.
    3. Two sovereignties coexisting in common territory.
    4. Corporation standing in position of government.
  B. Nature of criminal jurisdiction.
    1. Theories of criminal jurisdiction.
  C. The Jury System.
    1. The jury system in Porto Rico.
II. Due Process and Freedom of Contract.
  A. The Force of Statutes.
    1. May be disregarded by courts.
    2. Non-interference of courts with subjects properly within jurisdiction of other authorities.
  B. Due Process of Law.
    1. Elements of judicial controversy.
    2. What is not a court.
    3. Limits of administrative discretion.
    4. Delegation of legislative power.
    5. Function of administrative board as agency for marshalling public opinion.
  C. Freedom of Contract and the Police Power.
    1. Service Letter Act of Missouri.
    2. District of Columbia Minimum Wage Act.
  D. Methods of Dealing with Picketing.
    1. One representative for each point of ingress and egress.
    2. Requests to withhold patronage.

Conclusion.

actually applied in many cases. That is, two wrongs cannot make a right. This is good law.

But when the case comes to the Supreme Court of the United States, we find a different method used in handling it. Mr. Chief Justice Taft declares that the Supreme Court holds that it is the right of the taxpayer whose property alone is taxed 100 per cent of its true value to have his assessment reduced to the percentage of that value at which others are taxed even though this is a departure from the requirement of statute. The conclusion is based on that principle that where it is impossible to secure both the standard of the true value, and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of the law.

"The Supreme Court (of Nebraska) does not make it clear whether it thinks the discrimination charged was proved or not, but assuming the discrimination, it holds that the Bridge Company has no remedy except 'to have the property assessed below its true value raised, rather than to have the property assessed at its true value reduced.' * * * The conclusion * * * in federal authorities is that such a result as that reached by the Supreme Court of Nebraska is to deny the injured taxpayer any remedy at all because it is utterly impossible for him by any judicial proceeding to secure an increase in the assessment of the great mass of under-assessed property in the taxing district. This Court holds that the right of the taxpayer whose property alone is taxed at 100 percent of its true value is to have his assessment reduced to the percentage of that value at which others are taxed even though this is a departure from the requirement of statute. The conclusion is based on the principle that where it is impossible to secure both the standard of the true value, and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of the law. In substance and effect the decision of the Nebraska Supreme Court in this case upholds the violation of the Fourteenth Amendment to the injury of the Bridge Company. We must, therefore, reverse its judgment."[5]

5. 260 U. S. 441, 445, 446, 447.

This case is a striking one because of the extent to which the principle that courts may disregard statutes, is justified by Mr. Chief Justice Taft. Perhaps some readers will say that the idea that courts may disregard statutes is not a principle at all, but I submit that it is the effect of this decision to give that idea a dignity far beyond its true value. Nor is the Chief Justice at all hesitant in affirming the idea that the Nebraska statute may be overridden — "This Court holds that the right of the taxpayer whose property alone is taxed at 100 percent of its true value is to have his assessment reduced to the percentage of that value at which others are taxed *even though this is a departure from the requirements of statute.*"

In dealing with the separation of duties between commissions and courts, Mr. Chief Justice Taft holds the view that where the intent of Congress has been made manifest as being that of making a Federal commission the fact-finding body, the Court's rulings should not interject its views of the facts where there is any conflict in the evidence. This belief is expressed under the caption, "Mr. Chief Justice Taft, doubting," in Federal Trade Commission v. Curtis Publishing Company.[6]

This was a case of certiorari to a decree of the Circuit Court of Appeals which set aside an order entered against the respondent by the Federal Trade Commission. The Commission had ordered that the Curtis Publishing Company desist from entering into any contracts whereby its distributors should not handle magazines or papers of other publishing companies.

The procedure provided by statute to be followed in case the Commission's order is duly challenged consists of filing a transcript of the record to give the court jurisdiction to make and enter, upon the pleadings, testimony and proceedings, a decree affirming, modifying or setting aside the order. It is further specified that the Commission's findings as to the facts, if supported by evidence, shall be conclusive. The Court is empowered to order the taking of additional evidence for its consideration.

The reason for the doubt expressed by the Chief Justice is that one sentence of the majority opinion might be taken as having a double meaning.

6. 260 U. S. 568, Jan. 8, 1923.

"The sentence in the majority opinion, which makes me express doubt, is that discussing the duty of the court in reviewing the action of the Federal Trade Commission when it finds that there are material facts not reported by the Commission. The opinion says:

"'If there be substantial evidence relating to such facts from which different conclusions reasonably may be drawn, the matter may and ordinarily, we think, should be remanded to the Commission—the primary fact-finding body—with direction to make additional findings, but if from all the circumstances it clearly appears that in the interest of justice the controversy should be decided without further delay the court has full power under the statute so to do.'

"If this means that where it clearly appears that there is no substantial evidence to support additional findings necessary to justify the order of the Commission complained of, the court need not remand the case for further findings, I concur in it. It is because it may bear the construction that the court has discretion to sum up the evidence pro and con on issues undecided by the Commission and make itself the fact-finding body, that I venture with deference to question its wisdom and correctness. * * * I only register this doubt because I think it of high importance that we should scrupulously comply with the evident intention of Congress that the Federal Commission be made the fact-finding body and that the Court should in its rulings preserve the Board's character as such and not interject its views of the facts where there is any conflict in the evidence."[7]

The attitude which the Chief Justice has shown in these paragraphs indicates a due regard for the non-interference with other bodies and their properly assigned duties. It shows a wholesome respect for delimited areas of jurisdiction. The same point of view is maintained in the Child Labor case.[8]

Bailey was a collector of internal revenue for the District of North Carolina. A judgment had been entered against him for the recovery back of a tax imposed under the Child Labor Tax Act. This law prescribed the course of business which should be followed by employers. Among other things it was required that employers should employ children of an age greater than sixteen years in mines and quarries, that employers in mills and factories should employ children of an age greater than fourteen years, and that employers in mills and factories should prevent children of less than sixteen years of age from working more than eight hours a day or six days in the week. The penalty for violation of any of the provisions of the law was a penalty of ten percent of all income.

The tenth amendment of the Constitution provides that the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people. Article I, section 8, declares that the Congress shall have power to lay and collect taxes, duties, imposts and excises * * * but all duties, imposts and excises shall be uniform throughout the United States.

Mr. Chief Justice Taft held the Child Labor Law unconstitutional because it dealt with a question left by the supreme law of the land to the control of the states.

> "It is the high duty and function of this court * * * to decline to recognize or enforce seeming laws of Congress, dealing with subjects not intrusted to Congress, but left or committed by the supreme law of the land to the control of the states. We cannot avoid the duty even though it require us to refuse to give effect to legislation designed to promote the highest good. The good sought in unconstitutional legislation is an insidious feature because it leads citizens and legislators of good purpose to promote it without thought of the serious breach it will make in the ark of our covenant, or the harm which will come from breaking down recognized standards.
>
> "* * * Grant the validity of this law, and all that Congress would need to do hereafter, in seeking to take over to its control any one of the great number of subjects of public interest, jurisdiction of which the states have never parted with, and which are reserved to them by the tenth amendment, would be to enact a detailed measure of complete regulation

7. 260 U. S. 568, 582, 583.
8. 259 U. S. 20, Bailey v. Drexel Furniture Company, May 15, 1922.

of the subject and enforce it by a so-called tax upon departure from it. To give such magic to the word 'tax' would break down all constitutional limitation of the powers of Congress and completely wipe out the sovereignty of the states."[9]

Congress sought to regulate child labor by means of the taxing power, requiring that ten percent of all income of concerns violating the statute be paid to the federal government. The amount was computed on an annual basis. But when the Chief Justice believed that the requirements of the statute constituted something more than a tax, in short, that they amounted to a penalty and were therefore beyond the proper jurisdiction of Congress.

"The difference between a tax and a penalty is sometimes difficult to define, and yet the consequences of the distinction in the required method of their collection often are important. Where the sovereign enacting the law has power to impose both tax and penalty, the difference between revenue production and mere regulation may be immaterial; but not so when the sovereign can impose a tax only, and the power of regulation rests in another. Taxes are occasionally imposed in the discretion of the legislature on proper subjects with the primary motive of obtaining revenue from them, and with the incidental motive of discouraging them by making their continuance onerous. They do not lose their character as taxes because of the incidental motive. But there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty, with the characteristics of regulation and punishment. Such is the case in the law before us. Although Congress does not invalidate the contract of employment, or expressly declare that the employment within the mentioned ages is illegal, it does exhibit its intent practically to achieve the latter results by adopting the criteria of wrongdoing, and imposing its principal consequence on those who transgress its standard."[10]

An alleged tax loses its character as such and becomes a mere penalty, with the characteristics of regulation and punishment, when the provisions of the so-called taxing act are not naturally and reasonably adapted to the collection of the tax but are solely adapted to the achievement of some other purpose plainly within state power.[11]

Mr. Chief Justice Taft would distinguish the present case from that of McCray v. United States.[12] He declares that the principle set forth in that case,

"* * was that Congress, in selecting its subjects for taxation, might impose the burden where and as it would, and that a motive disclosed in its selection to discourage sale or manufacture of an article by a higher tax than on some other did not invalidate the tax. In neither of these cases did the law objected to show on its face, as does the law before us, the detailed specifications of a regulation of a state concern and business with a heavy exaction to promote the efficacy of such regulation."[13]

Throughout the opinion, in fact, the Chief Justice reminds us that the statute under consideration "shows on its face" that the primary purpose is regulation of working conditions within the states, and not revenue. He says that if the validity of this law is granted, Congress might hereafter regulate any subject of public interest by enacting a detailed measure of complete regulation of the subject and enforce it by a so-called tax upon departures from it. He declares that the motive of Congress to discourage sale or manufacture of an article by a higher tax than on some other, does not invalidate the tax so long as the law does not show on its face the detailed specifications of a regulation of a state concern and business.

But it seems to me that whether or not detailed specifications appear on the face of the law is not the important point. Indeed, the very words which Mr. Chief Justice Taft uses, show that this is not the heart of the matter. For in this very same connection he speaks of the motive of Congress "disclosed" in the selection by the Congress of certain articles to be more heavily taxed than others. If Congress selects certain articles to be more heavily taxed than others, and this selection is "disclosed," it is pertinent to ask where it is "disclosed." By choice of this word, Taft admits it is "disclosed" somewhere. The answer to this question must be that such preference of certain articles by giving a

9. 259 U. S. 20, pp. 37, 38.
10. 259 U. S. 20, 38.
11. U. S. v. Doremus, 249 U. S. 86.
12. 195 U. S. 27.
13. 259 U. S. 20. 42.

lower tax rate to them is "disclosed" only in the text of the statute. So the distinction which Mr. Chief Justice Taft would have us believe exists and which he has attempted to point out, seems to be a distinction without a difference. It is, in my opinion, an illustration of the fact that lawyers strive to rationalize the law and bring the cases into accord with each other.

I believe that a frank admission that the court thinks that in this particular case it would be going too far to allow Congress to place such a tax upon business, would be desirable. This would bring us to what seems to be the true question, viz. is it a question upon which Congress has a better right to have an opinion than the Supreme Court. That would raise the further question as to what means Congress had at hand in reaching its judgment that a tax should be applied. This in turn would raise the question of whether or not the means at the disposal of the court were greater or more limited than those at the disposal of Congress. It would seem the part of wisdom to accept as final the judgment of Congress or of the Supreme Court, according to the determination of the question as to which body has the better means for arriving at an intelligent opinion concerning the desirability of regulation of child labor by taxation.

This case is important because it emphasizes the position which the Supreme Court holds as the body to determine whether or not social reforms have been accomplished in the right way. There being various ways by which this can be accomplished —by Constitutional amendment, by Act of Congress, by act of the State legislature— and the Supreme Court having the opportunity of passing upon all of them, the Supreme Court may retard or promote social reform to some degree in accordance with its own desires. This statement must be taken with the proviso that such power of the Supreme Court is effectively limited by the type of subject matter before it. Ultimately, then, it is but a moulding influence which it thus exerts. Mr. Chief Justice Taft does not believe in using this influence to attain social reform at the expense of our structure of government.

We come now to the second of the four groups of cases which are to be discussed in this chapter, viz. those cases in which political theory is revealed in connection with a consideration of due process of law. The essential features of a judicial inquiry, as conceived by Mr. Chief Justice Taft, will be set forth; we shall ascertain what he considers is not a court; and the proper play of administrative discretion, the extent to which legislative power may be delegated, and the function of an administrative board as a force in the marshalling of public opinion, will be considered.

The case of Commissioners of Road Improvement District No. 2 of Lafayette Co., Ark., v. St. Louis Southwestern Railway Co.,[14] raised the question as to whether or not a proceeding in a state county court to assess benefits and damages growing out of a road improvement was properly removed to the Federal district court. The answer turned upon a determination of whether or not the proceeding was a suit at common law in a state court. If it was, the requisites of the removal statute had been fulfilled.

One step in the proceeding for the making of the road improvement would fulfill the definition of a judicial inquiry if made by a court. That was the determination of the issue between the road district, on the one part, and the landowners, on the other, as to the respective benefits which the improvement confers on their lands, and the damages they each suffer from rights of way taken, and other injury.

The importance, for political theory, of the opinion of Mr. Chief Justice Taft in this case is that it shows that proceedings for the exercise of legislative power and of administrative character on the one hand, and a judicial suit on the other, often are not clearly distinguishable. Mr. Taft definitely recognizes the difficulties which complicate the issue. His language is as follows:

> "The distinction between a proceeding which is the exercise of legislative power and of administrative character, and a judicial suit, is not always clear. An administrative proceeding transferred to a court usually becomes judicial, although not necessarily so. In Prentice v. Atlantic Coast Line Co., 211 U. S. 210, 225, 226, this court said:
>
> " 'We shall assume that when, as here, a state constitution sees fit to unite legislative and judicial powers in a single

14. 257 U. S. 547, Feb. 27, 1922.

hand, there is nothing to hinder, so far as the Constitution of the United States is concerned. A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts, under laws supposed already to exist. That is its purpose and end. Legislation, on the other hand, looks to the future, and changes existing conditions by making a new rule to be applied thereafter.'

"The inquiry before the county court is a proceeding to declare and enforce a liability of lands and their owners as it stands on present facts under a law and rules already made by the legislature and administrative officers. * * Of course, the statutory designation of the action of a body as a judgment, or the phrasing of its finding and conclusion in the usual formula of a judicial order, is not conclusive of the character in which it is acting. When we find, however, that the proceeding before it has all the elements of a judicial controversy, to wit—adversary parties and an issue in which the claim of one of the parties against the other capable of pecuniary estimation is stated and answered in some form of pleading, and is to be determined, we must conclude that this constitutional court is functioning as such."[15]

The elements of a judicial controversy, therefore, as stated by Mr. Chief Justice Taft, are six in number. (1) Adversary parties; (2) An issue; (3) the claim of one of the parties against the other; (4) a claim capable of pecuniary estimation; (5) a claim stated and answered in some form of pleading; and (6) a claim which is to be determined. But these are merely the earmarks of a judical controversy. Mr. Taft believes that the distinction between a proceeding which is the exercise of legislative power and of administrative character, and a judicial suit, is not always clear. As a political theorist, therefore, he would not hold with tenacity to the idea that the department of governments are separate and occupy their respective water tight compartments.

In the case of Howat v. Kansas[16] an attempt was made to get the Supreme Court to pass upon the validity of the Kansas Industrial Relations Act creating a Court of Industrial Relations. It was stated by Mr. Chief Justice Taft, however, that the case had not been presented in such a way as to permit the Supreme Court to pass upon these features of the Act which were attacked by the plaintiffs in error as violative of the Constitution of the United States. That being the case, one would not expect to find any indication in the language of the Chief Justice in deciding the case, which would give any intimation of whether or not the Supreme Court thought that the Court of Industrial Relations was a bona fide court. But reference is made to it by the phrase, "miscalled a court" which is a pretty evident lead as to what the court occupying the place of greatest power in the nation thinks of the Court of Industrial Relations.

"These are two writs of error to the Supreme Court of Kansas sued out * * * with the hope and purpose of testing the validity, under the Federal Constitution, of the act of the Legislature of Kansas creating a Court of Industrial Relations. * * *.

"We are of opinion that in neither case is the Kansas Industrial Relations Act presented in such a way as to permit us to pass upon those features which are attacked by the plaintiffs in error as violative of the Constitution of the United States.

"The main purpose of the act is to create an administrative tribunal to arbitrate controversies between employers and employees in certain industrial, mining and transportation businesses which the act declares to be affected with such a public interest that their continuity is essential to the public peace, the public health and the proper living conditions and general welfare of the people. The board, miscalled a court, is given power to make investigations * * *."[17]

As the nature of the Court of Industrial Relations was not in issue in the case, it is impossible to say what was the particular element which was lacking in its make-up to constitute it a real court. The issue of contempt was disposed of in the District court which had power, aside from the In-

(Continued on Page 29)

15. 257 U. S. 547, 554, 557.

16. 258 U. S. 181, March 13, 1922.
17. 258 U. S. 181, 182-183.

Book Reviews

By HARRY GRAHAM BALTER *of the Los Angeles Bar*
Lecturer in Law at the College of Law, Southwestern University

LAW OFFICE MANAGEMENT; Dwight G. McCarty, A.M., L.L.B., Member of the Iowa Bar; XIII and 386 pages; 1926; Prentice-Hall, Inc., New York.

In certain parts of Canada, the larger law firms have adopted the practice of including the word "Company" in the firm name, and instead of being known by a long list of names designating the members of the firm, we find just "Smith & Company" or "Brown & Company" Barristers, or Solicitors, as the case may be.

Although such a practice would perhaps at the present time seem to be repulsive to most members of the American bar, the Canadian innovation is at least a frank admission that our large law offices are indeed only large business organizations, with problems of organization and management worthy of comparison to those of any large company or corporation.

The practitioner with the small office and a limited amount of business seldom spends much thought on the question of managing his office. So long as his work is done—in some way or other—it matters not how. But to those who manage the affairs of the large, busy law offices, the problems of management are very important.

Mr. McCarty has made an effort to reduce the problems of law office management to a scientific basis. "During the last ten years a thorough investigation has been made of the methods employed in all lines of business and in law offices of all parts of the country. These data have been sifted and adapted to law office procedure and then tried and tested by the fire of actual practice in different localities."

The discussion treats of many of the important matters which arise in the course of the management of a law office. Not only the matter-of-fact subjects such as for example, Records and Charges, Modern Office Appliances, Office Arrangement, Better Letters, Office Filing System, Time-Saving Forms, Court Charge and Office Docket, and Billing a Client, are to be found, but there is an effort made by the author to treat also of those matters bordering on the psychological, and laying particular emphasis on the human element. So we find also, discussion upon such matters as Tuning up the Human Engine, Standardizing Habit, Fatigue, the Principle of Efficiency, and The Lawyers Personality.

While it is true that the aid of the volume will be appreciated mostly by the larger firms, it is not intended to convey the impression that there is nothing in the book which interests the lawyer with the smaller practice. The book is replete with useful suggestions which are of value to all lawyers. The discussion on the "Tickler" system of notations which are kept on cards so as to "tickle" the memory of the lawyer or his secretary on the proper day when his or her attention should be called to the matter, is very useful. Equally interesting is the discussion of the subject of "Billing a Client," in which Mr McCarty speaks of the new "psychological" form of statement of account. (page 313).

Of course, no matter how nicely and minutely schemes may be worked out, the element of hurry and rush which is present in many offices must be taken into account. A good deal of law work is routine, but some of the work is of an emergency nature, where quick and effective action is desired. In these cases, the tendency is always to forget "system" and "efficiency," and violate all scientific rules—so long as the desired relief is obtained. This is perhaps a deplorable situation, but one which nevertheless exists.

The little book on law office management is interesting and helpful. The various suggestions therein contained may not, of course, be suited for each particular type of law office with its own peculiar type of practice, but the suggestions are sound and from them each practitioner can devolve little devices and short-cuts to efficiency to suit his own particular office.

To many "old-time" lawyers, the coming of the "efficiency expert" in the field of law will no doubt be looked upon as an evil harbinger of the day when the revered legal profession will be reduced to the plane of "mere business," but their sighs of regret will not change the truth that the "old order changeth."

CHIEF JUSTICE TAFT

(Continued from Page 27)

dustrial Court Act, to issue the injunction involved in the case. What is to be noted is that Mr. Justice Taft remarked that the Court of Industrial Relations was "miscalled a court" although the case was not presented "in such a way as to permit us to pass upon those features" of the Kansas Industrial Relations Act attacked by the plaintiffs in error as violative of the Constitution of the United States. This seems to indicate a tendency to go outside of the question necessary to be considered for the determination of the particular issue.

(To Be Continued)

Special announcements by law firms of new locations and new associations are most effectively made to the profession through the pages of the BULLETIN. *In addition, such announcements serve as a manifestation of good-will toward and co-operation with the* BULLETIN *in its program of constructive endeavor for the welfare of the Bar Association.*